

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 16, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP144

Cir. Ct. No. 2010CV1607

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

DAN A. SPICE,

PLAINTIFF,

V.

AMELIA K. MOLZ, N/K/A AMELIA K. FAY,

DEFENDANT,

RURAL MUTUAL INSURANCE COMPANY,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,**

V.

ACUITY, A MUTUAL INSURANCE COMPANY,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed.*

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Rural Mutual Insurance Company appeals a summary judgment dismissing all claims against Acuity and declaring that Acuity has no duty to defend or indemnify Amelia Molz. Rural Mutual argues that Acuity (1) unlawfully amended its policy without Amelia’s knowledge and consent; and (2) constructively cancelled the policy without notice, contrary to WIS. STAT. § 631.36(2) (2011-12).¹ Rural Mutual alternatively argues that, even if § 631.36(2) does not apply, the amendment should be void as contrary to public policy. We reject Rural Mutual’s arguments and affirm the judgment.

BACKGROUND

¶2 Dan Spice filed the underlying suit against Amelia, alleging that on September 30, 2007, he suffered severe and permanent injuries after falling from the top of a Chevrolet Silverado pickup truck driven by Amelia. Spice’s complaint also named Rural Mutual as his uninsured motorist carrier. Rural Mutual then filed a third-party complaint against Acuity, asserting that at the time of the accident, the Silverado was covered under an Acuity policy issued to Amelia and her then-husband, Brad Molz.

¶3 Acuity moved for declaratory judgment, claiming that the Silverado was not a covered vehicle at the time of the accident. After a hearing, the circuit

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

court dismissed all claims against Acuity and declared that Acuity had no duty to defend or indemnify Amelia. This appeal follows.

DISCUSSION

¶4 This court reviews summary judgment decisions independently, applying the same methodology as the circuit court. *Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶5 It is undisputed that Acuity issued an insurance policy to Brad and Amelia in 2006 and, on March 1, 2007, the subject Silverado was added to the policy. On March 21 and again on June 21, 2007, Brad asked his insurance agent to remove Amelia and the Silverado from the Acuity policy. Brad's requests were denied based on the agency's policy against removing a named insured without that insured's signed consent. Approximately two weeks before the accident, Brad contacted Acuity directly to renew his request.

¶6 Because Brad, as a named insured, had the authority to remove the Silverado from the policy, the Silverado was removed as a covered vehicle. Amelia was not removed from the policy but, rather, her status was changed to a "nondriver," meaning she was not being charged a rate. Despite the status change, Amelia continued to have uninsured and underinsured motorist coverage, along with liability coverage for driving a Mitsubishi that remained covered under the policy, any temporary substitute vehicle, a borrowed vehicle, and any other "insured vehicle" as defined in the policy.

¶7 Acuity issued amended declarations confirming the policy changes and noting that the changes were effective on the date requested. The amended declarations were mailed to the Molzes' agent and to the Molzes' address of record on the same day. The Molzes' insurance agent, Cindy Steinbach, received the amended declarations on September 22, 2007, and, later that day, personally informed Amelia that Brad "had removed her and the truck from the policy" and that it was "effective immediately." On September 25, Steinbach followed up with a letter and insurance coverage quote reiterating: "**As of September 18th, you have had NO insurance on your 2007 Chevy Silverado with our agency or Acuity.**"² Amelia did not seek coverage for the Silverado until the day after the accident.

¶8 In granting the motion for summary declaratory judgment, the circuit court held that (1) Acuity lawfully amended the policy; (2) Acuity did not cancel the policy without Amelia's signature; and (3) Amelia took no steps to insure the Silverado, despite constructive notice of the policy change, until after the accident.

¶9 On appeal, Rural Mutual argues that Acuity breached the insurance contract when it made a material change to the policy without Amelia's knowledge or consent. We are not persuaded. Rural Mutual fails to specify what

² To the extent Rural Mutual may be attempting to create a dispute of material fact with respect to Amelia's knowledge of the policy change, Amelia confirmed the accuracy of a 2007 sworn statement in which she testified that she knew she did not have coverage for the Silverado prior to the accident because of what Steinbach told her in person and in the follow-up letter. At an August 2011 deposition, Amelia denied remembering what she said in 2007. For purposes of summary judgment analysis, however, statements that a party does not believe, know, or remember certain matters do not place in dispute facts which are sworn to by another witness. See *Leszczynski v. Surges*, 30 Wis. 2d 534, 539, 141 N.W.2d 261 (1966) ("[E]videntiary facts stated in the affidavits are to be taken as true if not contradicted by other opposing affidavits or proof.").

provision of the policy was breached and provides no authority for its claim that removal of the Silverado was a material change requiring Amelia's consent. Although Rural Mutual argues that all meaningful coverage for Amelia was "stripped" when the Silverado was removed, Amelia continued to have uninsured/underinsured motorist coverage, along with liability coverage for driving the Mitsubishi, any temporary substitute vehicle, a borrowed vehicle, and any other "insured vehicle" as defined in the policy. Ultimately, Rural Mutual has failed to establish that removal of the Silverado at the request of a named insured violated any policy contract provision.

¶10 Next, Rural Mutual contends that, because Acuity's actions amounted to a cancellation of Amelia's insurance policy, Acuity violated the notice provisions required by WIS. STAT. § 631.36(2). The statute, however, applies only to cancellations by the insurer of an insurance policy. As noted above, the policy was amended, not cancelled.³ Because the policy was not cancelled, the notice requirements of § 631.36(2) do not apply.

¶11 Finally, Rural Mutual argues that the constructive cancellation of Amelia's insurance policy without adequate notice to her should be void as contrary to public policy. As discussed above, Amelia's insurance policy was not cancelled, constructively or otherwise. Moreover, even assuming public policy

³ Rural Mutual asserts that the circuit court "erroneously based its conclusion regarding cancellation on a disputed fact." Specifically, Rural Mutual argues that there is a dispute regarding whether Brad requested that Amelia be removed as an insured under the policy as opposed to reclassified as a non-rated driver. As Acuity points out, however, the determination of what Brad actually requested with respect to Amelia is not a dispute of "material" fact because Acuity did not remove her from the policy.

requires adequate notice, the record establishes that Amelia had *actual* notice of the insurance policy amendment several days before the accident.

¶12 Despite this actual notice, Rural Mutual contends that Amelia believed the policy amendment would not come into effect until the end of the policy term. It is undisputed, however, that Steinbach informed Amelia in person and by letter that coverage on the Silverado had ended. No reasonable insured would believe that she had coverage under these circumstances. Rural Mutual provides no public policy grounds to justify voiding the policy amendment.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

